

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3424-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

GISELLA WOOD,

Plaintiff-Respondent,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION,**

Defendant-Appellant,

BRIGGS & STRATTON CORPORATION,

Defendant.

APPEAL from an order of the circuit court for Milwaukee County:
LOUISE M. TESMER, Judge. *Affirmed and cause remanded.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. The Labor and Industry Review Commission (LIRC) appeals from a circuit court order reversing its decision to deny Gisella Wood worker's compensation benefits. LIRC's decision affirmed an administrative law judge's (ALJ) findings that Wood sustained a transient aggravation of a pre-existing back problem but no permanent disability. Based on these findings, LIRC denied Wood's claim to compensation for loss of earning capacity. The circuit court reversed LIRC's decision, concluding that there was insufficient credible evidence in the record to support LIRC's decision. Because the trial court correctly decided that LIRC's decision was predicated on two material factual errors, we affirm the trial court's order.¹

BACKGROUND

Wood applied for permanent partial disability under Wisconsin's worker's compensation act. Because Briggs & Stratton denied that Wood's "accident or disease causing injury arose out of [her] alleged employment" at Briggs & Stratton, a hearing was conducted on Wood's claim. Our summary of the evidence submitted at the hearing follows.

Wood was employed by Briggs & Stratton for thirty years. For many years she worked as a parts deburrer until that job was eliminated in December of 1990. Wood then transferred to the "focus factory" where she operated machines that reamed, drilled, and tapped motor components. Wood estimated that her line made one motor every seventeen seconds. The cylinders that Wood handled weighed approximately twelve pounds. It was undisputed that Wood's operation of the machinery and handling of the cylinders required her constant bending, lifting, turning, and twisting.

On September 24, 1991, Wood ceased working due to back problems and sought medical treatment. She was seen by her family physician who referred Wood to Dr. Steven L. Nord, an orthopedic specialist. Dr. Nord determined that Wood had aggravated a pre-existing degenerative disc condition causing her to become symptomatic. After treating Wood for ten months, Dr. Nord found that Wood had a permanent disability that limited her

¹ This is an expedited appeal under RULE 809.17, STATS.

residual functional capacity to light/medium work as of August 4, 1992. More specifically, Dr. Nord reached the opinion that Wood had suffered a 2% permanent partial disability due to her lower back condition.

On November 20, 1991, Wood saw Dr. David Haskell for a brief independent medical examination. Dr. Haskell, retained by Briggs & Stratton for the examination, issued a report determining that Wood suffered from a "transient aggravation" of a pre-existing degenerative disease secondary to rheumatoid arthritis in the lumbar spine and degenerative disc disease. Dr. Haskell offered the opinion that no permanent disability had arisen from Wood's work. Dr. Haskell determined that Wood could return to work with certain permanent limitations, including the elimination of repetitive lifting, bending, twisting, and turning. Dr. Haskell put a thirty-five pound weight limit on any regular lifting by Wood.

Frank R. Fischer, Briggs & Stratton's personnel manager, testified that Wood was on temporary total disability from September 25, 1991, until approximately November 25, 1991. Thereafter, Wood was placed on temporary layoff status by the company and was paid unemployment compensation. Wood subsequently retired.

The ALJ rejected Wood's application for permanent partial disability. After first finding that the parts Wood lifted weighed less than one pound each, the ALJ concluded that Dr. Haskell's opinion was more credible than Dr. Nord's opinion regarding Wood's condition "since the weights involved in the employment were minimal and the length of the employment was for a relatively short period before the onset of back symptoms." LIRC affirmed and Wood sought judicial review in the circuit court. The trial court reversed LIRC's decision for the reason that it was predicated on key errors of fact and remanded the matter for further proceedings. LIRC now seeks this court's review.

DISCUSSION

We review LIRC's decision under the same standard of review as the trial court. See *Nelson v. LIRC*, 123 Wis.2d 221, 224, 365 N.W.2d 629, 630 (Ct. App. 1985). LIRC's findings of fact are conclusive as long as they are supported by credible and substantial evidence. Section 102.23(6), STATS. Accordingly, our role is limited to reviewing the record to determine if substantial credible evidence exists to support LIRC's findings. *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs., Ltd. v. LIRC*, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993).

LIRC contends that the record contained credible and substantial evidence to support its decision that "given the minimal [sic] amount of weight involved in her work, Dr. Haskell's opinion is most credible that her continuing back problems are related to her preexisting advanced degenerative condition, and not due to her work for the employer." We disagree.

The record was undisputed that Wood's employment required her to lift twelve-pound cylinders while continuously twisting, bending and turning. Apparently confusing the testimony of Wood regarding the conditions of her employment and the testimony of the personal manager regarding alternative employment that Briggs & Stratton was considering offering to Wood, the ALJ made an erroneous finding of fact:

In August 1991, the applicant developed the gradual onset of low back pain which she related to lifting cylinders which she claims weighed 10 pounds. However, these pistons were the size of a baseball and the rod was only three or four inches in length as testified by the respondent's personal [sic] manager and his estimate that they weighed less than a pound is adopted herein.

The ALJ went on to rely on that erroneous finding of fact to determine that Dr. Haskell's opinion regarding the cause of Wood's back condition was more credible than the opinion of Dr. Nord.

When confronted by Wood's claim that the ALJ's decision contained a material and erroneous finding of fact, LIRC drafted a decision both embracing the ALJ's error and expanding the error by speculating that no medically significant distinction exists between lifting a one-pound piston or a ten-pound cylinder:

[T]he Commission does not find that the Administrative law Judge made an error of fact. The Administrative Law Judge found that the applicant's work involved weights which were minimal. The Commission agrees with the Administrative Law Judge that whether the applicant's work involved weights of 10 pounds, or less than one pound, the amount of weight involved was minimal.

We cannot affirm LIRC's decision. The record submitted to the ALJ contained no evidence to support the ALJ's initial finding that the motor parts involved weighed one pound each or LIRC's speculative finding that the weight of the motor parts involved were minimal, whether these parts weighed one pound or ten pounds. Because LIRC's speculative finding of fact was the linchpin of its decision to adopt the ALJ's finding that Dr. Haskell's medical opinion was more credible than Dr. Nord's and to dismiss Wood's claim, the circuit court's order to reverse and remand the matter for further proceedings must be affirmed.

By the Court. – Order affirmed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.